

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Forbearance Under 47 U.S.C. § 160 (c))	WC Docket No. 05-170
From Application of Unbundling Rules that Limit)	
Competitive Alternatives)	
_____)	

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTelecom)¹ submits its comments through the undersigned and pursuant to the Federal Communications Commission's (FCC's or Commission's) Public Notice² requesting comment on the Petition for Forbearance (Petition) filed by XO Communications, Inc., Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Eschelon Telecom, Inc., NuVox Communications Inc., SNiP LiNK LLC, and Xspedius Communications (Petitioners) in the above-referenced docket.³ USTelecom urges the Commission to deny the Petition because forbearance is not the appropriate method for addressing the matters raised by the Petitioners.⁴

¹ USTelecom is the nation's leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

² Public Notice, WC Docket No. 05-170, DA 05-2003, Pleading Cycle Established for Comments on Petition for Forbearance of XO Communications, Inc. et al. Pursuant to 47 U.S.C. § 160(c) (July 13, 2005).

³ *Petition for Forbearance Under 47 U.S.C. § 160(c) from Application of Unbundling Rules that Limit Competitive Alternatives*, Petition for Forbearance, WC Docket No. 05-170 (filed March 28, 2005).

⁴ USTelecom is not addressing the Petition on its merits, but notes here that the Commission has already fully addressed the issues raised in the Petition and made findings contrary to the requests.

Although Petitioners' titled filing is a request for forbearance from three Commission rules regarding access to unbundled network elements (UNEs),⁵ the true nature of the filing is a request to re-visit the Commission's findings that were adopted or reaffirmed in its Order on Remand in the Triennial Review proceeding⁶ and to re-regulate incumbent local exchange carriers (ILECs). More specifically, the Petitioners seek forbearance from a number of Commission rules that were based on a finding that competitors to ILECs are not impaired without access to certain UNEs or by being subject to eligibility criteria for the use of EELs, with the intent of re-regulating ILECs by requiring them to provide the UNEs at issue and to offer EELs under less stringent conditions.

Without any affirmative regulatory obligations to unbundle the elements identified in the Petition, there is no regulation from which to forbear. Forbearance only makes sense in the context of affirmative regulatory obligations. Since there is no pre-existing obligation to unbundle all the elements of a network, forbearance from the Commission's findings in the Order on Remand would not cause an unbundling obligation to spring back to life. Similarly, the Commission's decisions not to require unbundling of the three elements in question are not limitations on a pre-existing obligation to unbundle so that the limitations constitute the regulations, which can be eliminated through forbearance. Therefore, a grant of forbearance from a rule that states a carrier is not required to unbundle certain elements cannot then require a

⁵ Petitioners seek forbearance from "applying (1) the wire center-based test for DS1 loop impairment to 'predominantly residential' and 'small office' buildings; (2) the DS1 dedicated transport cap to the use of DS1/DS1 EELS; and (3) eligibility criteria to the use of Enhanced Extended Links ('EELs')." Petition at 1.

⁶ See generally *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (rel. Feb. 4, 2005) (Order on Remand).

carrier to unbundle those elements. Again, there are no unbundling obligations to reinstate. Moreover, the Commission should be cognizant that to grant forbearance would allow carriers seeking certain UNEs for which there is no affirmative unbundling requirement to do an end run around the requirements of section 251(d)(2) where Congress established a process for the Commission to determine what network elements should be unbundled.

In addition to the nonsensical nature of the Petitioners' request, the purpose itself of section 10(a) of the Telecommunications Act of 1996 (Act) should guide the Commission to deny the Petition. The plain language of section 10(a) of the Act⁷ is clearly intended to limit regulation, not to increase it. Specifically, section 10 provides the Commission with the authority to "forbear" from applying provisions of the Communications Act of 1934, as amended (Act), or its rules when there is a showing that such provisions or rules are no longer warranted⁸ and that forbearance is in the public interest. Similarly, the fact that the section 10 forbearance provision is included in an act that is premised on the Congressional objectives of promoting competition and *reducing regulation*⁹ in the telecommunications marketplace is instructive. Notably, in Senate discussion of the forbearance provision, Senator Larry Pressler stated that forbearance "will allow the FCC to *reduce* the regulatory burdens on a carrier when competition develops, or when the FCC determines that *relaxed* regulation is in the public interest."¹⁰ The purpose of section 10 could not be clearer. It is to reduce regulatory burdens on carriers when

⁷ 47 U.S.C. § 160(a).

⁸ Specifically, the showing must demonstrate that the provisions or rules are no longer warranted to ensure charges, practices, classifications, or regulations for a carrier or service are just and reasonable, and not unjustly or unreasonably discriminatory, and that the provisions or rules are no longer warranted to protect consumers.

⁹ See Preamble to the Telecommunications Act of 1996 (emphasis added).

¹⁰ 141 CONG. REC. S7886 (daily ed. June 7, 1995) (remarks of Sen. Pressler) (emphasis added).

the regulations are no longer warranted and when such forbearance would be in the public interest. It is not to add regulatory requirements.

The Commission has already found, or affirmed, in its Order on Remand that ILECs' competitors are not impaired without unbundled access to DS1 loops anywhere in a wire center with at least 60,000 business lines and at least four fiber-based collocators; that ILECs' competitors are not impaired where they seek to provide more than 10 DS1 transport circuits on routes where the Commission has required some DS1 transport unbundling;¹¹ and that ILECs are not required to provision UNEs as part of EELs that do not meet the eligibility criteria established in the Triennial Review Order.¹²

By these findings, the Commission has already determined not to regulate ILECs by requiring them to provide competitors with access to certain facilities as UNEs. Yet, it is clear that what the Petitioners want is for the Commission to re-visit its Order on Remand and to find that they are impaired without access to the UNEs identified in their Petition and to broaden the regulatory requirement imposed on ILECs by limiting the eligibility criteria under which they must provide EELs. In short, they want the Commission to impose regulations on ILECs, using

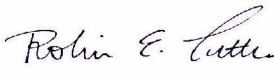
¹¹ The DS1dedicated transport cap plainly applies even if a CLEC was using the DS1 transport circuits as part of a DS1/DS1 EEL. The cap does not prevent CLECs from obtaining more than 10 DS1 UNE loops in a wire center as part of EELs. Instead, CLECs may combine their DS1 UNE loops with UNE DS3 transport (where available) or with non-UNE DS3 (or higher capacity) transport, by multiplexing the DS1 transport circuits that had been used for DS1/DS1 EELs onto a DS3 transport circuit. As the Commission found in establishing the cap, that is what a reasonably efficient carrier does.

¹² See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (Triennial Review Order), *corrected by* Errata, 18 FCC Rcd 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 313 (2004).

the forbearance process, after those same regulations were already reduced or after certain regulatory requirements were already limited. As discussed previously, forbearance from rules that do not affirmatively require unbundling cannot reinstate unbundling obligations that do not exist and forbearance cannot be used to increase regulation. For these reasons, the Commission should deny the Petition for Forbearance.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: 
James W. Olson
Indra Sehdev Chalk
Jeffrey S. Lanning
Robin E. Tuttle

Its Attorneys

607 14th Street, NW, Suite 400
Washington, DC 20005
(202) 326-7300

September 12, 2005

CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on September 12, 2005, the aforementioned Comments of The United States Telecom Association were electronically filed with the Commission through its Electronic Comment Filing System and electronically mailed to the following:

BCPI
Portals II
445 12th Street, SW
CY-B402
Washington, DC 20554
fcc@bcpiweb.com

Janice M. Myles
Federal Communications Commission
Wireline Competition Bureau
Competition Policy Division
445 12th Street, SW
Suite 5-C327
Washington, DC 20554
Janice.myles@fcc.gov



By: _____

Meena Joshi